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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

January Term 1977
No. _____

MARATHON OIL COMPANY,
Petitioner,

vs.

FEDERAL ENERGY ADMINISTRATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Temporary Emergency Court of Appeals
of the United States

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Dated: February 9, 1977

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vs.

FEDERAL ENERGY ADMINISTRATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Temporary Emergency Court of Appeals
of the United States

Petitioner, Marathon Oil Company, prays that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered on December 6, 1976.

OPINIONS BELOW

The opinions of the Temporary Emergency Court of Appeals and of the United States District Court for the Northern District of Ohio, Western Division, neither of which has been reported, are contained in the Appendix to this Petition, 1a, et seq. and 18a, et seq., respectively.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered December 6, 1976. Thereafter, a Petition

for Rehearing and a Suggestion for Rehearing En Banc were timely filed. Each was denied by order entered January 10, 1977. The issuance of the mandate, by order entered January 18, 1977, has been stayed pending the filing of this Petition.

Jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904 note (Supp. 1976), which is incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §754(a)(1), and under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where the Emergency Petroleum Allocation Act expressly authorizes, as a tool for allocation purposes only, the control of prices of covered products, but is silent as to any authority to control credit, may the Federal Energy Administration nonetheless regulate credit transactions within the petroleum industry on the implied and self-serving premise that credit is an inseparable part of price for allocation purposes?

STATEMENT OF THE CASE

This action was brought by Petitioner in the United States District Court for the Northern District of Ohio, Western Division to challenge portions of the mandatory petroleum allocation and price regulations of the Federal Energy Administration (FEA). Federal jurisdiction in the court of first instance was based upon §§210(a) and 211(a) of the Economic Stabilization Act of 1970, as amended, 84 Stat. 799, 12

U.S.C. §1904 note (the Stabilization Act), which provisions are expressly made applicable to the regulations challenged in this action by §5(a) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 619, 15 U.S.C. 751 - 756 (the Allocation Act) and upon 28 U.S.C. 1331 and 2201. Venue was laid in the Northern District of Ohio in accordance with 28 U.S.C. §1391(e). The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

The now-expired Stabilization Act was an across-the-economic-board enactment which empowered the President to "stabilize prices, rents, wages, and salaries, . . . interest rates and finance charges." Section 203 (Appendix, pp. 25a-26a). The still viable Allocation Act which became effective November 27, 1973, coexisted for some five months with the Stabilization Act, until the latter's demise on April 30, 1974.

The Allocation Act grants only "specific temporary authority" (§2(B)) with regard to the petroleum industry, authorizing the allocation of "crude oil, residual fuel oil and each refined petroleum product, in amounts . . . and at prices specified in (or determined in a manner prescribed by) such regulation" (§4(a)) (Appendix, p. 39a).

Whereas the Stabilization Act had granted specific authority over "rents," "interest rates" and "finance charges," as well as "prices," the Allocation Act remained significantly silent with respect to every economic consideration except "price" and "amount." This is doubly

significant, since Congress borrowed entire sections from the Stabilization Act for incorporation into the Allocation Act (§§205-211, Stabilization Act - Appendix, pp. 36a-37a), but did not borrow therefrom even the specified credit terms of "interest rates" and "finance charges." (§203, Stabilization Act - Appendix, pp. 25a-26a).

With the expiration of the Stabilization Act on April 30, 1974, the FEA admittedly lost its only express statutory authority to regulate rents, interest rates, finance charges or other credit terms within the economy, including the petroleum industry. Thereafter, control authority over credit terms within the petroleum industry was to be found, if at all, by rationalization only of the restricted pricing authority under the Allocation Act.

Thus, on May 1, 1974, in Ruling 1974-10, 39 Fed. Reg. 15140 (1974) (Appendix, pp. 46a-49a), FEA asserted authority to control under its price regulations credit terms between a petroleum refiner and its purchaser. On May 21, 1974, FEA proposed an amendment to the challenged regulation, 10 C.F.R. §210.62(a), to make clear that "credit terms are to be treated generally under the regulations as a function of price." 39 Fed. Reg. 18471 (1974) (Appendix, p. 44a). In so doing, the FEA totally disregarded prior Cost of Living Council (CLC) rulings that interest rates, finance charges and other credit terms were not subject to regulation as prices. CLC Phase IV Price Ruling 73-16, 38 Fed. Reg. 33189 (1973) (Appendix, pp. 44a-45a); Special Freeze Groups Questions

and Answers No. 8, Question 12, 38 Fed. Reg. 17191 (Appendix, p. 44a).

On the very day the Stabilization Act expired, FEA amended its regulations to assert authority to regulate rentals respecting real property used in retailing gasoline, on the basis that such rents were "inextricably woven into the fabric of the supplier's marketing system and ***** directly related to the price at which gasoline is sold at retail." 39 Fed. Reg. 15140 (1974) (Appendix, p. 46a).

It was then FEA's theory that rents and credit terms were indistinguishable for allocation purposes and that regulation of both as inseparable parts of price was "the only effective and administratively feasible method of preventing industry-wide circumvention of its price regulations . . . " FEA's Reply Brief in Shell v. FEA, T.E.C.A. No. 5-13, P. 3 (Appendix, p. 49a).

In an independent action, Shell Oil Company challenged this theory in the courts with respect to the rent issue and prevailed. T.E.C.A. held therein that FEA's authority to regulate rents, as distinguished from prices, terminated with the demise of the Stabilization Act and that FEA was without authority under the Allocation Act to regulate the rent chargeable for the use of real property, as it was without authority to allocate real property. See Shell Oil Co. v. FEA, 527 F. 2d 1243 at 1246 (T.E.C.A. 1975). Later, in Atlantic Richfield Co. v. Zarb, 532 F. 2d 1363 (T.E.C.A. 1976), T.E.C.A. reiterated that the "FEA simply has no authority to regulate directly or indirectly the use of real property or the leasing of service station property."

When, in the instant case, the FEA continued pursuit of its inseparability concept already discredited in Shell, Petitioner sought refuge in the Shell and Atlantic Richfield decisions, contending that rents and credit terms were indistinguishable for allocation purposes. By analogy, since the FEA was without authority under the Allocation Act to allocate credit, it was similarly without authority to regulate the terms chargeable for the use of credit. However, for reasons which are not sustainable, as hereinafter seen, a separate panel of T.E.C.A. determined that credit terms constitute an inseparable part of price.

REASONS FOR GRANTING THE WRIT

The decision below raises a significant and recurring issue of federal law which has not been, but should be, settled by this Court. It also establishes an appellate precedent in the area of price - credit separability which conflicts with pronouncements by this court in the antitrust field, with a decision of another Court of Appeals in the Robinson-Patman field, and with a decision of another panel of T.E.C.A. itself in the allocation field.

A. The Decision Below Raises A Significant And Recurring Question Of Great Moment To The Petroleum Industry

The importance of this case far transcends a mere dispute between Petitioner and FEA. The regulation challenged herein adversely affects almost every seller of products subject to the Allocation Act.

Consequently, the decision below will have far-reaching precedential impact in an area of regulation vital to every firm, large and small, within the petroleum industry, from the producer of crude oil to the retail marketer of gasoline, unless it is corrected by this Court.

Virtually every seller of crude oil or petroleum products enters into some form of credit transaction with his purchasers. Some such credit transactions are ancillary to sales of products, but many are not. Nevertheless, all are claimed by FEA to be within the ambit of the regulation challenged herein. Such disparate transactions as the honoring of bank-issued credit cards and the practice of granting service station construction loans, as well as typical vendor's credit terms such as cash discounts and time of payment, are asserted by FEA to be subject to its claimed authority over credit.

Numerous pending and threatened enforcement proceedings, both before the FEA and in the Courts, hinge on the ultimate definitive response to the question presented herein. This case, therefore, has understandably attracted widespread interest and concern throughout the petroleum industry. The entire industry is awaiting its outcome.

Petitioner submits that it is imperative that this Court review the decision of the Court below. The importance to the petroleum industry of the issues presented fully warrants this Court's ultimate resolution.

B. The Decision Below Conflicts With Applicable Decisions Of This Court And Another Court of Appeals

In Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969), this Court held that the credit granted by a seller of a product (in that case, prefabricated houses) represented a separate and distinct "product" for purposes of tie-ins coming within the proscription of §1 of the Sherman Act upon contracts in restraint of trade. In that case, the Court said that there was "no basis for treating credit differently in principle from other goods and services." 394 U.S. at 509. The Court further noted, it is true, that in some sales on credit, "the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product." 394 U.S. at 507. However, the Court expressly left to another case the delineation of the standards for determining when such a transaction might involve only a "single product."

In validating the FEA's theory that credit granted by a seller of petroleum products constitutes an inseparable part of the price of such products, the decision of T.E.C.A. below strikes directly at the rationale of this Court in Fortner. Not only has T.E.C.A. arrogated to itself the establishment of standards for determining when a "single product" is involved, it has, contrary to the Fortner decision, determined in effect that every credit transaction in the petroleum industry involves, in effect, a "single product" and, therefore, is inseparable from price.

While this case and the Fortner case arise under different statutes, they both involve the separability of product prices and credit and irreconcilably conflict on the resolution of this issue.

The decision below also conflicts with the decision of the Court of Appeals for the Tenth Circuit in Craig v. Sun Oil Co., 515 F. 2d 221 (10th Cir. 1975). There, the Court determined, by necessity, that for purposes of §2(a) of the Robinson-Patman Act, credit terms and price were readily distinguishable. It held that "discrimination in credit terms [as distinguished from price] . . . could not, as a matter of law, be the basis for a claim" under that Act. 515 F. 2d 224.

Again, the instant case and Craig arise under different statutes. However, both revolve about the central issue of whether credit is an inseparable part of the price of another product. On this issue they are irreconcilably conflicting.

C. The Decision Below Conflicts With A Prior T.E.C.A. Decision On The Separability Issue

Since there is only one T.E.C.A., it is virtually impossible for it to render "a decision in conflict with the decision of another Court of Appeals on the same matter," within the literal intendment of Rule 19 of this Court. Notwithstanding, conflicts can and have arisen between decisions of separate panels of T.E.C.A. which are no less compatible or reconcilable with each other than are conflicts between the circuits. The instant case is one of these.

The decision below has resulted in a patent nonuniformity with the prior decisions by T.E.C.A. in Shell and Atlantic Richfield. It purports to relegate those decisions to a status of mere "dicta" (Appendix, p. 6a, note 7). The stature of these prior decisions as viable precedent in the area of pricing and allocation of petroleum products has been seriously impugned. The current pronouncement by T.E.C.A. invites the FEA to treat every ordinary cost of doing business in the marketing of petroleum products as an inseparable part of price for regulatory purposes, although Shell said without equivocation that this was beyond the power, express or implied, of the FEA.

If, as Petitioner contends and, indeed, insists, credit transactions within the petroleum industry are simply another cost of doing business which are logically and necessarily separate from product price, then this Court should be hard pressed to leave unattended a critical wound to a major segment of the national economy.

Secondly, the decision below invites a multiplicity of new and piecemeal litigation seeking to determine what are or are not "ordinary costs of doing business" within the meaning of Shell and Atlantic Richfield and what are or are not "inextricable parts of price" within the meaning of Marathon. To leave these conflicts and questions unresolved by the highest court in the land would not only invite unnecessary judicial extravagance, but would frustrate those persons vitally concerned with the fair and reasonable conduct of the petroleum industry (from the producer of crude

oil through the retailer of gasoline) and would further aggravate the conditions sought to be remedied by the Allocation Act itself. Without the authoritative ruling of this Court upon these critical energy issues, the time of their ultimate resolution may well find the objectives of §2(b)(1) of the Act themselves "frustrated" beyond remedy.

In this regard, Petitioner must certainly assume that this Court will ultimately ask itself: "Were not the questions raised by this Petition resolved by T.E.C.A.'s denial of the Petition For Rehearing and its rejection of the Suggestion For Rehearing en banc?" Petitioner thinks not. The logic of the question should not be blinding to the realities involved. T.E.C.A. is, by title, a "temporary" court, an "emergency" court. It is not called upon to render policy decisions for posterity, but simply to act promptly and expediently, but fairly, during the energy crisis. In this context, rehearings would tend to be self-defeating, particularly since parties aggrieved by T.E.C.A. decisions have reserved to them the right of appeal to this Court.

It is conceded, certainly, that T.E.C.A. was established for the purpose, among others, of bringing particular expertise to the resolution of problems arising in the energy field, including the allocation of certain petroleum products. But this is not to say that such expertise necessarily extends to distinct areas of the national economy such as the money and credit markets. Where, as here, T.E.C.A. has gone well beyond the scope of its particular expertise, this Court

should not hesitate to entertain the case for consideration on the merits.

D. The Decision Below Erred In Holding That Credit Is An Inseparable Part Of Price For Allocation Purposes

The parties hereto, in both courts below, agreed that the Allocation Act confers no express authority to regulate credit. The District Court found this omission especially significant because: (1) the Stabilization Act had expressly conferred such authority; and (2) while the Allocation Act incorporated Sections 205 through 211 of the Stabilization Act, dealing with certain procedural matters, it did not carry forward the provisions of the Stabilization Act authorizing regulation of credit. Following the example of T.E.C.A. in the Shell case, the District Court declined the FEA's invitation to infer authority to control credit from the express statutory authority under the Allocation Act to allocate products or to regulate prices.

The panel of T.E.C.A. in this case, however, did succumb to the FEA's "siren song" and held that, under the implied power doctrine, FEA does have authority to control credit in the petroleum industry. The legislative and administrative background, as well as the language of the Allocation Act itself, militates against this holding.

As T.E.C.A. correctly noted in Shell, the Allocation Act includes authority to control prices of covered products as a tool to implement the authority to allocate such products. Had Congress intended

the FEA to have authority to regulate credit to implement its allocation authority, it would surely have expressed that intent, as in the matter of prices. Having expressly provided, as a tool, the power to control prices, Congress would not sensibly have left to mere implication the authority to control credit or any other ordinary cost of doing business.

That the authority to regulate prices did not imply the authority to control credit is clear, as the District Court found, both from the backdrop of the Stabilization Act and from the fact that the CLC consistently, throughout the Economic Stabilization Program, determined that credit was not subject to regulation as price. Relying upon a "litigation affidavit" which the court below erroneously characterized as "unchallenged," T.E.C.A. erred in determining that the CLC had in fact controlled credit during Phase IV of the Economic Stabilization Program. This determination, however, flies in the face of the pronouncements of the CLC itself. CLC Phase IV Price Ruling 73-16, 38 Fed. Reg. 33189 (1973) (Appendix, pp. 44a-45a); Special Freeze Group Questions and Answers No. 8, Question 12, 38 Fed. Reg. 17191 (Appendix, p. 44a).

In accepting the FEA's plea to infer authority over credit, T.E.C.A. adopted the FEA's fallacious argument that the control of credit is a necessary means to effectuate its authority to regulate pricing and allocation of products. This line of argument ignores the fact, however, that money is a fungible product and that credit is accessible from sources other than sellers of petroleum products. In the absence of

demonstrable dominating power over the credit market, a seller of petroleum products may not charge any more for the credit it extends than the charge his customer would incur in the open credit market. The seller could not effectively use credit as a device to frustrate the allocation rights of his customers, for the customers would always have the option of obtaining credit in the open market and paying cash to the seller for any products purchased.

If a seller, by sufficient economic power as to credit, were able to charge more for his credit than generally prevailing rates and thereby through subterfuge contravene those regulations fairly within the FEA's authority, the FEA could, of course, take appropriate enforcement action. The regulation being challenged, however, goes far beyond the mere prevention of circumvention of valid price and allocation regulations through subterfuge. Rather, it controls credit, qua credit, irrespective of any real or imagined attempt to evade other valid regulations.

CONCLUSION

For the reasons stated, the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINIONS BELOW

Temporary Emergency Court of Appeals of the United States

No. 6-11

MARATHON OIL COMPANY, PLAINTIFF-APPELLEE,

v.

FEDERAL ENERGY ADMINISTRATION, *et al.*,
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Northern District of Ohio, W.D.

(Civ. C 74-316)

(Argued September 17, 1976 Decided December 6, 1976)

SCOTT H. LANG, Federal Energy Administration, Washington, D.C., with whom REX E. LEE, Assistant Attorney General, STANLEY D. ROSE, C. MAX VASSANELLI, Department of Justice, Washington, D.C., were on the brief for the Defendants-Appellants.

JOHN W. HACKETT, JR., Shumaker, Loop & Kendrick, Toledo, Ohio, with whom THOMAS G. PLETZ, DAVID W. WICKLUND, were on the brief for Plaintiff-Appellee.

J. FURMAN LEWIS, Marathon Oil Company, Findlay, Ohio, for the Plaintiff-Appellee.

Before CHRISTENSEN, JAMESON, and GRANT, Judges.

CHRISTENSEN, Judge.

This case presents the question of whether, absent express authority in the Emergency Petroleum Allocation Act for the regulation of credit terms as such, the Federal Energy Office, now the Federal Energy Administra-

tion (FEA)[1] was precluded from requiring a continuation of normal credit practices by suppliers of petroleum products as a part of its "maintenance of normal business practices rule."

In the light of *Shell Oil Co. v. FEA*, 527 F.2d 1243 (TECA 1975), and *Atlantic Richfield Co. v. Zarb*, 532 F.2d 1363 (TECA 1976), which the court below interpreted as requiring the striking down of the credit terms "regulation", we must reexamine the breadth and flexibility of the agency's powers in accomplishing the objectives of the Act and the administrative deference rule which, with other considerations, led us in *Condor Operating Company v. Sawhill*, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975), to sustain as neither arbitrary, capricious nor beyond statutory authority the FEA's supplier/purchaser relationship maintenance rule concerning the sale of domestic crude oil.

Plaintiff-appellee, Marathon Oil Company, filed this action in the district court to enjoin the enforcement of provisions of the FEA's regulations dealing with rentals of real property used in the retailing of gasoline,[2] and credit terms under which its products were sold.[3] The

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[1] The Federal Energy Office became the Federal Energy Administration on June 27, 1974, pursuant to the Federal Energy Administration Act of 1974 (Pub. L. No. 93-159). Both FEO and FEA for convenience generally will be referred to hereinafter as "FEA".

[2] 10 C.F.R. §§ 212.101-103 (1975), 3 CCH Energy Management ¶¶ 13,863-65.

[3] "Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. 'Summer fill' programs and other 'dating' or seasonal credit programs are among the normal business practices which must be maintained by a supplier under this paragraph, if that supplier had such programs in effect during the base period. Credit terms other than those associated with seasonal credit programs are included as a part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this Chapter. Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products, as customarily associated with that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms). However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms)." 10 C.F.R. § 210.62 (a), 2 CCH Energy Management ¶ 13,532.05.

rental regulations were held invalid in *Shell Oil, supra*, and that ruling is not disputed in this case.

Marathon further contended successfully before the district court, and its position remains the same here, that the FEA lacked authority under § 4(a) of the Emergency Petroleum Allocation Act, 15 U.S.C. § 753 (a) (Supp. V, 1975), to require the maintenance of normal credit terms in petroleum product transactions as a part of its mandatory allocation and pricing program. Because power to regulate credit terms was expressly granted in the now expired Economic Stabilization Act[4] but not explicitly continued by the EPAA,[5]

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[4] 12 U.S.C. § 1904 note. Up until the expiration date, April 30, 1974, "interest rates" were expressly made subject to regulation by § 203(a) (2) of the Act while § 203(e) empowered the President to require the issuance of regulations or orders providing for the stabilization of "interest rates and finance charges", both without limitation as to activities, industries or sections of the economy.

[5] "Not later than fifteen days after [this Act's enactment], the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or deter-

Congress must have intended, Marathon argued, to withhold from the President any authority to control credit terms in connection with sales of petroleum products. Marathon additionally aserted that the maintenance of seasonable credit terms and payment schedules in "summer fill" and other "dating" programs under 10 C.F.R. § 210.62(a) was not consistent with provisions in § 4(b)(2) of the EPAA requiring provision, among other things, for a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil and refined petroleum products, and use of the same date in the computation of markup, margin and posted price for such products.

The latter contention was not reached by the district court in view of its agreement with Marathon's major contention that there was an overriding absence of authority for the agency to "regulate" credit terms at all. On cross-motions for summary judgment, it concluded that "10 C.F.R. § 210.62(a) [*see* n.3] is invalid as beyond the scope of authority granted by the Emergency Petroleum Allocation Act . . . to the extent that it regulates the credit terms which a supplier of petroleum products may apply to the purchaser of said products." Accordingly, the court granted plaintiff's (appellee's) motion for summary judgment and denied defendants' (appellants') motion.

Conceding that "the government's reasoning with respect to the necessity for regulating credit is much more cogent than it is with respect to rents", the district court found itself unable to "circumvent the fact that no authority was granted under the Allocation Act to regulate credit."[6] Principally on this theory it concluded

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mined in a manner prescribed by) and that prices specified in (or determined in a manner prescribed by) such regulation. . . ." EPAA § 4(a), 15 U.S.C. § 753(a) (Supp. V, 1975).

[6] We assume that the district court, rather than begging the question of implied power, sought to make the point that no express authority having been granted with reference to credit terms, as such, there was indication by Congress that the usual rule of implied power to do whatever is necessary or convenient in the execution of express powers should not apply and that the agency could not touch upon credit terms at all in regulating other aspects of the allocation and pricing of petroleum products.

that *Shell Oil* and *Atlantic Richfield*, *supra*, mandated invalidation of the regulation in question and it added:

> The Government relies heavily upon the legislative history of the Allocation Act, and while it is clear from said history that Congress intended to continue the price controls established by Phase IV under the Stabilization Act, *Consumers Union of the United States v. Sawhill*, 525 F.2d 1068 (TECA 1975), it is not at all clear that credit terms were being regulated under Phase IV. In fact, the opposite is true. Interest rates and finance charges were not subject to regulation under Phase IV. *See Cost of Living Council Freeze Regulations, Special Freeze Questions and Answers No. 8, Question 12*, 38 Fed. Reg. 17491 (July 2, 1973); *Cost of Living Council Ruling 1972-73*, 37 Fed. Reg. 197491 (July 6, 1972). Thus even though Congress intended the Phase IV price controls to continue, this did not include the regulation of credit terms. This Court is therefore compelled to find that, as with rental regulations, the regulation of credit terms is beyond the scope of the authority granted in the Allocation Act.

We granted the government's motion for stay pending appeal and denied Marathon's motion to dismiss the appeal or in the alternative to affirm, in the tentative view that the appeal could not be considered frivolous and, particularly, that *Shell Oil* and *Atlantic Richfield* did not as a matter of law foreclose the government's position. Thus, we maintained the status quo pending more

thorough consideration following briefing and oral argument.

In *Shell Oil* this court determined that the FEA at the time in question had no power to regulate rentals of service station property either from any independent authorization or as a part of its authority to regulate oil allocations and pricing under the EPAA. The problem here presented, however, for reasons which follow, is not analogous to those we confronted in *Shell Oil*, and *Atlantic Richfield*, accepting each of the grounds of decision there as correctly determined.[7]

In both cases, there was involved a regulation of the operation of service stations, *per se*,[8] as distinguished

[7] Reaffirmation of the rationale of *Shell Oil* by and in the context of *Atlantic Richfield Co.* v. *Zarb*, 532 F.2d 1963 (TECA 1976), *supra*, was dicta in a sense, since the latter case was controlled by its own holding that after the lease of a service station had expired, the operator's attempt to tie his product demand to an illegal occupancy did not invoke any right pursuant to the continuation of wholesale-purchaser relationships requirement. Indeed, that portion of *Shell Oil* upon which the appellee here relies similarly might be considered dicta; the court otherwise determinatively concluded that the rental regulation from the beginning was invalid, "[f]inding that no circumstances exist justifying a failure to comply with Section 4 of the Administrative Procedure Act . . ." in its promulgation.

[8] 10 C.F.R. § 212, Subpart G, 39 Fed. Reg. 1924 (Jan. 15, 1974) as amended 39 Fed. Reg. 15139 (May 1, 1974:

"212.101. This part applies to each leased property used in the retailing of gasoline where both the lessor and lessee are refiners, resellers or reseller-retailers as defined in this part.

. . . .

"212.103. A lessor or lessee of real property used in retailing gasoline may not [then follows regulations with reference to the base period and there is added:]

[Continued]

from the provision here in question tied closely to the maintenance of normal business practices in relation to pricing of products.[9] In turn, the latter aspect of the regulation is more clearly allied with the continuation of the relationship device basic to the allocation program as a whole.[10]

[8] [Continued]

"(C) impose any operating requirements on the retailer which would be unreasonably inconsistent with the standards or goals of the Emergency Petroleum Allocation Act of 1973 or the Federal Energy Office including but not limited to a requirement that the retailer extend his hours of operation beyond his customary hours of operation."

[9] It is to be recalled that § 210.62(a) [*see* n. 3] provides in pertinent part:

"Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period . . . Credit terms other than those associated with seasonal credit programs are included as a part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this Chapter."

[10] See the "General provisions", Subpart A and the numerous other provisions referred to therein and particularly:

"§ 211.2 Relationship of subparts.

"Unless otherwise specified in Subparts D through K of this part, the general provisions set forth in this subpart apply to the mandatory allocation of all allocated products.

"§ 211.9 Supplier/purchaser relationships.

"(a) *Supplier/wholesale purchaser relationship.* (1) Each supplier of an allocated product shall supply all wholesale purchaser-resellers and all wholesale purchaser-consumers which purchased or obtained that allocated product from that supplier during the base period as specified in Subparts D through K of this part.

"(2) (i) Unless otherwise provided in this part or directed by FEA, the supplier/wholesale purchaser-reseller relationships defined by specific dates or base periods or otherwise imposed pursuant to this part shall be maintained for the

A little history will render other distinctions plainer and establish that while the trial court would have been accurate if it had observed that credit terms were not regulated throughout the entire economy under Phase IV, it erred in assuming that credit terms in connection with the sale of petroleum products had not been.

The Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, gave the President authority to "stabilize prices, rents, wages and salaries" as well as to "stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth." § 203(a) (1) and (2).

During Phase IV, the Cost of Living Council (CLC) made the decision that, as a general matter, it would not control finance charges and interest rates as it had authority to do under the Stabilization Act. It did, however, control credit terms and payment schedules in its Phase IV petroleum regulations, inaugurated in mandatory form on August 19, 1973, 38 Fed. Reg. 22536 (Aug. 22, 1973), in connection with "a class of purchaser rule." 6 C.F.R. § 150.355(b) (1974) (the basic refiner price rule) and § 150.359(c) (the basic reseller and retailer

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duration of the Mandatory Petroleum Allocation Program and may not be waived or otherwise terminated without the express written approval of FEA.

"(ii) Unless otherwise provided in this part or directed by FEA, the supplier/wholesale purchaser-consumer relationships defined by specific dates or base periods or otherwise imposed pursuant to this part shall be maintained for the duration of the Mandatory Petroleum Allocation program and may not be revised or otherwise terminated except that any such relationship may be terminated by the mutual consent of both parties. . . ."

This court has addressed other aspects of the continued relationship reguirement in *Condor, supra,* and *Amtel, Inc.* v. *FEA,* —— F.2d —— (TECA 1976).

price rule) each provided that a firm could not charge any class of purchaser a price exceeding the base prices for that product. The base price was defined as "the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973", plus certain adjustments. 6 C.F.R. § 150.355(g) (1) (i). *See also* § 150.359(c) (1). A "class of purchaser" was in turn defined as "purchasers or lessees to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees." And "a customary price differential" was defined in § 150.31 as "a price distinction based on a discount, allowance, add-on, premium and an extra based on a difference in volume, grade, quality, or location or type of purchaser or a term or condition of sale or delivery."

An unchallenged affidavit of O. T. Vipperman, Jr., Director of Price and Allocation Policy of FEA shows that based upon these regulations, CLC required suppliers to maintain any customary differentials in the base price for each class of purchaser in existence on May 15, 1973, and that as an element of the base price and customary price differential, suppliers of petroleum products were required to maintain discounts and other terms or conditions of sale or delivery, including credit terms and payment schedules in effect on May 15, 1973.

Pursuant to delegated authority under the EPAA, the agency issued proposed mandatory allocation price regulations on December 11, 1973, 38 Fed. Reg. 34414. The proposed price regulations incorporated the CLC's Phase IV petroleum price regulations.

> With respect to economic units and transactions subject to this part, the maximum price which a seller may charge and a buyer may pay is the price permitted pursuant to the provisions set forth in Part

150 of Title 6 of the Code of Federal Regulations. 38 Fed. Reg. 34414 at 34434 (Dec. 13, 1973).

This price rule was enacted on December 27, 1973, 39 Fed. Reg. 744 (Jan. 2, 1974).

On January 14, 1974, the FEA issued new Mandatory Petroleum Allocation and price regulations, 39 Fed. Reg. 1924 (Jan. 15, 1974). These were set out in Parts 200-212 of 10 C.F.R. Again CLC's Phase IV petroleum price regulations were substantially incorporated into FEA's Mandatory Petroleum Price Regulations.

In addition to Part 212 of the FEA regulations, which contained the price rules, the initial FEA regulations contained Part 211, setting out the various allocation programs mandated by the EPAA, and a Part 210 containing general allocation and price rules applicable to the programs set forth in both parts 211 and 212. As issued on January 14, 1974, Part 210 contained a provision, Sec. 210.62(a), which required the maintenance of "normal business practices", including a specific prohibition against imposing more stringent credit terms or payment schedules than were in effect during the base period. Thus, CLC's control of credit terms as they directly pertained to transactions involving petroleum products, was made an explicit part of FEA's regulatory scheme.

The affidavit of Mr. Vipperman explains the reasoning and policy of the agency:

> Although the CLC regulations [under Phase IV] had also controlled credit terms and payment schedules implicitly . . . the FEA determined that this rule should be made explicit due to the likelihood that firms might otherwise revise their credit or payment arrangements in a manner that would frustrate or circumvent the mandatory price and allocation regulations in Parts 211 and 212. Moreover, although the requirement to maintain normal business practices had been interwoven into the price regulations by the CLC's class of purchaser doctrine, it was not similarly contained in the allocation regulations and it was feared that without such a provision suppliers would attempt to engage in payment schedule practices which would frustrate the allocation programs. . . .
>
> The agency's separate regulation of credit terms as a function principally of price and regulation of certain seasonal credit terms as a function primarily of allocation represented recognition of the varying roles which credit and other conditions of sale can play in the flow of product.

On November 27, 1973, the EPAA had become law.[11] Prior to that time the Energy Policy Office had published for comment proposed mandatory petroleum allocation and price regulations. These proposed regulations contained a provision calling for the continuation of normal business practices, including maintenance of preexisting credit terms. 38 Fed. Reg. 21797 at 21802 (Aug. 13, 1973).

Mandatory allocation and price regulations had been issued as to propane (38 Fed. Reg. 27397 (Oct. 3, 1973)) and middle distillate fuels (38 Fed. Reg. 28660 (Oct. 16, 1973)), with specific reference to the maintenance of normal business practices, including credit terms.

There is no room for doubt that Congress knew of these regulations and proposals when it considered passage of the Act. The committee report recited that "most of the work [in drafting a regulatory frame-

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[11] The EPAA has been amended and extended by the "Energy Policy and Conservation Act", P.L. 94-163, 89 Stat. 871. These amendments will not be further referred to since they are not pertinent here.

work] has already been accomplished." [12] There are other indications of congressional intent that the new fuel allocation program should be patterned after the previously proposed program.[13]

The lack of a specific grant of authority to regulate credit terms was taken by the lower court as evidence that the disputed authority was not intended. We think the opposite conclusion is more reasonable in view of

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[12] "The President is specifically directed [by the Act] to promulgate a regulation providing for the mandatory allocation of crude oil . . . within 10 days of enactment and to make that regulation effective 15 days thereafter. In normal events, this would be an extraordinarily short time for so complex a task. Most of the work, however, has already been accomplished. The Administration has had several months experience under the voluntary program. Drafting of a mandatory program has been in progress for over two months. Moreover, in August the President published for comment a proposed mandatory allocation program of similar scope to that called for in this bill." H.R. Rpt. #93-531, 93d Cong., 1st Sess. (Sept. 29, 1973) at p. 12, U.S. Code Cong. & Admin. News 93d Cong., 1st Sess., 2582, 2589 (1973). The program here referred to obviously is the EPO's Proposed Mandatory Fuel Allocation Program above-mentioned (38 Fed. Reg. 21797 (Aug. 13, 1973)).

[13] Section 6(a) of the EPAA provides:

"All actions duly taken pursuant to [§ 203(a)(3) of the Stabilization Act] in effect immediately prior to the effective date of the regulation promulgated under section 4(a) of this Act, shall continue in effect until modified pursuant to this Act. Those actions included CLC Phase IV regulations which required the maintenance of normal business practices including 'credit terms and payment schedules'." *See also* EPO Mandatory Allocation Program for Propane Fuels, 38 Fed. Reg. 27397, 27398 & 5 (Oct. 3, 1973), and EPO Mandatory Allocation Program for Middle Distillate Fuels, 38 Fed. Reg. 28660, 28662-63 §§ 8-9 (Oct. 16, 1973). *See also* H.R. Rpt. #93-638, pp. 20-21, 93d Cong., 1st Sess. (Nov. 10, 1973), U.S. Code Cong. & Admin. News 93d Cong., 1st Sess. 2688, 2697 (1973).

the legislative history cited. Appellants' argument, that if Congress had intended the agency to "regulate" credit terms it would have expressly granted that authority, fails also because a general grant was not intended; only the limited power necessarily implied for the exercise of the authority expressly granted over the allocation and pricing of petroleum products or oil.

Aside from legislative history, to deny to the agency the power in question would be inconsistent with the broad discretion and flexibility we have consistently recognized in the agency's mandated attainment of the objectives of the EPAA.[14] We here are not dealing with any attempt to regulate credit terms or interest generally, such as would have been invited had Congress empowered the agency to do so in the terms employed by the Stabilization Act on the subject. Detailed powers necessary or convenient to the allocation and pricing authority granted with reference to the petroleum industry did not have to be spelled out, for the Congress, as well as judges, was fully cognizant of the doctrine of implied powers. The mandating of regulations to achieve the broad objectives enumerated in the Act [15] essentially

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[14] *See, e.g.*, Cities Service Co. v. FEA, 529 F.2d 1016 (TECA 1975), *cert. denied*, —— U.S. —— (1976); Pasco, Inc. v. FEA, 525 F.2d 1391 (TECA 1975); Condor Operating Co. v. Sawhill, 514 F.2d 351 (TECA 1975), *supra*.

[15] 753 . . . (a) not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. . . .

(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

. . . .

[Continued]

entailed selection on the part of the agency of means in its judgment best suited, as to which the rule of deference for administrative decisions [16] should not be

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[15] [Continued]

(D) preservation of an economically sound and competitive petroleum industry. . . .

. . . .

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry. . . .

(I) minimization of economic distortion, inflexibility and unnecessary interference with market mechanisms.

In this connection recurrence to Chief Judge Tamm's language in *Consumers Union of U.S., Inc.* v. *Cost of Living Council*, Appendix, 491 F.2d 1396 (TECA 1974) is yet again salutary:

"It is appropriate at this juncture to digress momentarily to elaborate on the breadth of FEA's regulatory discretion under the Act. A starting point is the proposition that 'the width of administrative authority must be measured in part by the purposes for which it was conferred.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 20 L.Ed. 2d 312 (1968). Nowhere could this oft-repeated rubric be more relevant than where Congress acts in a crisis situation. The Emergency Petroleum Allocation Act is Congress' response to precisely such a situation. The regulations mandated by section 4(a) are to provide for, to the maximum extent practicable, the *broad* objectives of section 4(b)(1), *supra* part I. One would be at great pains to characterize this legislation as pervasively filling every interstice, leaving only mandatory duties to the administrative body charged with its implementation. To the contrary, I think the Congressional intent was to hew a sphere of responsibility within which FEA could decide how to proceed against the crisis. The grant of such broad regulatory discretion is inconsistent with Consumer's Union's and the majority's view of FEA's statutory responsibilities." At pp. 1077-78.

[16] Fry v. United States, 421 U.S. 542 (1975); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971);

departed from or grudgingly applied by the unwarranted extension sought by appellee of *Shell Oil* and *Atlantic Richfield*.[17] What was said in *Condor* is applicable to this aspect of the overall program there addressed.[18]

In sum, the district court's assumption that under Phase IV credit terms had not been controlled by CLC is negated by the record. Unlike the rental situation of *Shell Oil* and *Atlantic Richfield*, there appears no legislative history inconsistent with the credit terms provisions in question; on the contrary there are affirmative indications that Congress intended to grant authority to promulgate just such rules as have been imposed. Credit

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Tasty Baking Co. v. Cost of Living Council, 529 F.2d 1005 (TECA 1975); Reeves v. Simon, 507 F.2d 455 (TECA 1974); Mandel v. Simon, 493 F.2d 1239 (TECA 1974); Pacific Coast Meat Job. Ass'n, Inc. v. Cost of Living Coun., 481 F.2d 1388 (TECA 1973); University of Southern California v. Cost of Living Council, 472 F.2d 1045 (TECA 1972).

[17] *Cf.* the later case of Spinetti v. Atlantic Richfield Co. and FEA, —— F.2d —— (TECA Nos. 9-35, 36, Oct., 1976), in which we remanded for evidentiary hearing concerning an asserted violation of the supplier/purchaser relationship requirement of 10 C.F.R. § 211.9, despite Atlantic Richfield's contention there that since its claimed violation involved only a continued use of "real estate" the doctrine of *Shell Oil* concerning "rental regulations" precluded further consideration as a matter of law. We thus resisted the tyranny of the term "real estate regulation" for a deeper look at substance in respect to the allocation and pricing authority of the agency.

[18] "We are of the view not only that Congress had the power to grant authority to the President and his delegates within the guidelines of the Act to pursue the objectives enumerated, but that the regulation in question, as a part of the entire plan, was a rational exercise of that power. . . . We cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted. *Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 88 S.Ct. 1344, 1365, 20 L.Ed.2d 312 (1968). 514 F.2d at p. 359."

terms are more clearly a function of pricing and allocation than service station rentals. Having conceded power to prevent and punish evasion of allocation or pricing measures on an *ad hoc* basis, the agency had authority to impose general requirements to facilitate and render practical its expressly granted power with respect to petroleum products. Neither the appellee nor the trial court has recognized sufficiently the distinction between power to regulate credit terms *per se* and power to regulate such terms as a reasonable and non-arbitrary, non-capricious means of more effectively regulating the pricing and allocation of petroleum products to achieve the objectives of such expressly granted power. Neither the trial court nor the appellee have founded their position on any contention that the regulations are arbitrary or capricious. And to deny totally the authority in question, as the trial court's judgment would do if permitted to stand, would obstruct unduly the judgment and discretion of the agency and limit the doctrine of implied powers in unjustifiable departure from the rule of deference to which this court is committed. For the reasons stated, the summary judgment granted by the district court must be reversed.

In the briefs and at oral argument references were made to a possible alternative rationale for upholding the district court's decision as it deals with "summer-fill" and other "dating" programs under 10 C.F.R. § 210.62(a)—the theory that the regulation was invalid because it failed to comply with the "dollar-for-dollar passthrough" provision of § 4(b)(2)(A) of the EPAA (15 U.S.C. § 753(b)(2)(A)), and the "date for computation of markup, margin, or posted price" provision of § 4(b)(2)(C) of the EPAA (15 U.S.C. § 753(b)(2)(C)). Because the lower court did not reach these issues, and in view of changes the related regulations have undergone since the filing of this lawsuit, we deem it

inappropriate to further consider them in the first instance. The case must be remanded to the lower court for such consideration.

Reversed and remanded for further proceedings not inconsistent with this opinion.

(CAPTION OMITTED IN PRINTING)

Upon consideration of Appellee's Motion for Rehearing and Suggestion for Rehearing En Banc,

IT IS ORDERED that the Motion and Suggestion are hereby DENIED.

FOR THE COURT:

RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

January 10, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action C74-316

MARATHON OIL COMPANY, Plaintiff

vs.

FEDERAL ENERGY ADMINISTRATION, et al., Defendants

(Filed June 23, 1976)

OPINION AND ORDER

YOUNG, J:

This cause came on to be heard upon cross motions of the parties for summary judgment. Rule 56, Fed. R. Civ. P. This is an action to enjoin the enforcement of two provisions of the Federal Energy Administration (hereafter the FEA) regulations dealing with (1) rentals of real property used in the retailing of gasoline, and (2) credit terms under which plaintiff sells petroleum products. The parties agree that no genuine issue of any material fact is in dispute, and therefore, the case may be decided by summary judgment.

Defendants concede that the validity of the regulations concerning the rental of real property, 10 C.F.R. §§201-203, was resolved by the Temporary Emergency Court of Appeals in the case of Shell Oil Company v. Federal Energy Administration, No.

5-13 (T.E.C.A. filed Nov. 11, 1975). In Shell, the rental regulations were held invalid and the Government has acquiesced in said opinion and has not attempted to relitigate their validity in this Court.

The validity of the regulation governing credit terms, 10 C.F.R. §210.62(a), however, was not considered in the Shell case and is thus very much contested in this case. It, in fact, presents the sole issue for decision by this Court.

Section 4(a) of the Emergency Petroleum Allocation Act (hereafter the Allocation Act), 15 U.S.C. §753(a) states in part:

> (a) Not later than fifteen days after the day of enactment of this Act [15 U.S.C.A. §§751-756], the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation ....

Executive Order 11748, 38 Fed. Reg. 33575, created the Federal Energy Office which later became the Federal Energy Administration and delegated to it the authority to promulgate regulations under the Allocation Act. Pursuant to this authority, the FEA promulgated regulation 210.62(a), which states:

§210.62 Normal business practices.

(a) Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. "Summer fill" programs and other "dating" or seasonal credit programs are among the normal business practices which must be maintained by a supplier under this paragraph, if that supplier had such programs in effect during the base period. Credit terms other than those associated with seasonal credit programs are included as a part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this Chapter. Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products, as customarily associated with that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms). However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms).

It is the validity of this regulation which must be determined.

The parties have filed copious briefs and affidavits in support of their respective positions. The issue presented in said briefs are great in number and extremely complex in their subject matter. At the heart of this case, however, lies one very basic question:

> Was the FEA granted authority under the Allocation Act to promulgate regulation 210.62(a) with respect to credit terms?

If the answer to the question is no, then all other issues fall by the wayside and need not be decided.

There is no dispute that up until April 30, 1974, credit terms could be regulated pursuant to §§203(a)(2) and 203(e) of the Economic Stabilization Act of 1970, 12 U.S.C. §190 (sic) note (hereafter Stabilization Act). Section 203(a)(1) of said act empowered the President to issue regulations to stabilize prices, rents, wages, and salaries. Section 203(a)(2) empowered him to regulate interest rates and corporate dividends. Finally, §203(e) allowed the President to require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges. The Stabilization Act expired on April 30, 1974. In the meantime, on November 27, 1973, the Allocation Act went into effect and thus for approximately five months the two acts overlapped.

The Allocation Act conferred upon the President and thus upon the FEA the authority to allocate petroleum products by regulating price and amount. Credit

terms were never mentioned. The Government argues, however, that credit terms are woven into the fabric of price and that the purposes for which the Allocation Act was credted (sic) will be defeated if it is not allowed to regulate credit. Marathon, on the other hand, argues that just as with rents, specific authority to regulate credit was withheld in the Allocation Act. It argues further that since finance charges and interest rates were explicitly stated as being subject to regulation in the Stabilization Act, Congress would again have specifically so stated had it intended to continue the authority to regulate credit in the Allocation Act.

The Court agrees with Marathon's position and finds that the regulation being challenged is beyond the scope of the authority granted it by the Allocation Act. While the Government's reasoning with respect to the necessity for regulating credit is much more cogent than it is with respect to rents, see Shell Oil Company v. Federal Energy Administration, supra at p. 6, it is difficult to circumvent the fact that no authority was granted under the Allocation Act to regulate credit. Said Act did allow the Government to continue actions brought pursuant to §203 of the Stabilization Act if said actions were commenced before the effective date of the regulations promulgated under §4(a) of the Allocation Act. See 15 U.S.C. §755(a). The Allocation Act did not, however, incorporate §203. This is especially significant in light of the fact that §§205 through 211 of the Stabilization Act were incorporated into the Allocation Act. See 15 U.S.C. §754(a)(1).

The Government relies heavily upon the legislative history of the Allocation Act, and while it is clear from said history that Congress intended to continue the price controls established by Phase IV under the Stabilization Act, Consumers Union of the United States v. Sawhill, 525 F.2d 1068 (T.E.C.A. 1975), it is not at all clear that credit terms were being regulated under Phase IV. In fact, the opposite is true. Interest rates and finance charges were not subject to regulation under Phase IV. See Cost of Living Council Freeze Regulations, Special Freeze Questions and Answers No. 8, Question 12, 38 Fed. Reg. 17491 (July 2, 1973); Cost of Living Council Ruling 1972-73, 37 Fed. Reg. 197491 (July 6, 1972). Thus even though Congress intended the Phase IV price controls to continue, this did not include the regulation of credit terms. This Court is therefore compelled to find that, as with rental regulations, the regulation of credit terms is beyond the scope of the authority granted in the Allocation Act. Summary judgment will be entered in favor of the plaintiffs (sic).

Therefore, for the reasons stated herein, good cause appearing, it is

ORDERED that 10 C.F.R. §210.62(a) is invalid as beyond the scope of the authority granted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §751 et seq. to the extent that it regulates the credit terms which a supplier of petroleum products may apply to a purchaser of said products, and it is

FURTHER ORDERED that the motion of plaintiff for summary judgment should be,

and it hereby is, granted and the clerk shall enter judgment in accordance herewith, and it is

FURTHER ORDERED that the motion of the defendants for summary judgment should be, and it hereby is, overruled.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Don J. Young
United States
District Judge

Toledo, Ohio.

(CAPTION OMITTED IN PRINTING)
(FILED JUNE 23, 1976)

JUDGMENT

This action came on for hearing before the Court, Honorable Don J. Young, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that judgment is entered in favor of plaintiff, Marathon Oil Company.

Dated at Toledo, Ohio, this 23rd day of June, 1976.

Mark Schlachet
Clerk of Court
by Margaret B. Lewis
Deputy Clerk

STATUTORY PROVISIONS INVOLVED

Excerpts from the Economic
Stabilization Act of 1970

(12 U.S.C. §1904 note (Supp. 1976))

Section 203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to--

"(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

"(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth; and

"(3) provide after public hearing, conducted with such notice, under such regulations and subject to such review as the exigencies of the case may, in his judgment, make appropriate for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to

prevent anticompetitive effects resulting from shortages of such products."

* * *

"(e) Whenever the authority of this title is implemented . . ., the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges. . . ."

* * *

Secton 205. Confidentiality of information; public disclosure

"(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

"(b)(1) Any business enterprise subject to the reporting requirements under section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2)) so required which covers a period during which that business enterprise charges a price for a

substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such products on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term 'substantial product' means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

"(2) A business enterprise may exclude from any report made public pursuant to paragraph (1) any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

"(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or

relates to the trade secrets, processes, operations, style of work or apparatus of the business enterprise.

Section 206. Subpena power

"The head of an agency exercising authority under his title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpena served upon any person under the provisions of this section, the head of the agency authorizing such subpena, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

Section 207. Administrative procedure

"(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of sections 552, 553, and 555(e) of title 5, United States Code.

"(b) Any agency authorized by the President to issue rules, regulations, or

orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings where deemed advisable, for considering such requests for action under this section. . . .

"(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under secion 205 of this title.

Section 208. Sanctions; criminal fine and civil penalty

"(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

"(b) Whoever violates any order or regulation under this title shall be

subject to a civil penalty of not more than $2,500 for each violation.

Section 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

Section 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

Section 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b)(1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from

time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subjection (d)(2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such

issue to the Temporary Emergency Court of Appeals. Upon such certifications, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d)(1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be

deemed to refer to the Temporary Emergency Court of Appeals.

"(e)(1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency

Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as

provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section appy to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title."

Excerpts from the Emergency Petroleum Allocation Act of 1973, as amended

(15 U.S.C. §751 et seq.)

"Section 2. (a) The Congress hereby determines that -

"(1) shortages of crude oil, residual fuel oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

"(2) Such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

"(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

"(b) The purpose of this Act is to grant the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall

be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy."

* * *

"Section 4. (a) Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation."

* * *

"(b)(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for -

"(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

"(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

"(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

"(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

"(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

"(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent markets, and among all users;

"(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extration of -

(i) fuels, and

(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Excerpts from Regulations of the
Federal Energy Administration

Section 210.62 Normal business practices.

"(a) Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. 'Summer fill' programs and other 'dating' or seasonal credit programs are among the normal business practices which must be maintained by a supplier under this paragraph, if that supplier had such programs in effect during the base period. Credit terms other than those associated with seasonal credit programs are included as a part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this Chapter. Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products, as customarily associated with that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms). However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms)."

* * *

(c) Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include, but are not limited to devices making use of inducements, commissions, kickbacks, retroactive increases, transportation arrangements, premiums, discounts, special privileges, tie-in agreements, trade understandings, falsification of records, substitution of inferior commodities or failure to provide the same services and equipment previously sold.

Excerpts from Other Relevant Rulings and Regulations

FEA Notice Of Proposed Rule Making
To Amend 10 C.F.R. §210.62(a)
Issued May 21, 1974

". . . This proposed amendment to the regulation is to make clear that credit terms are to be treated generally under the regulations as a function of price." 39 Fed.Reg. 18471 (1974).

COST OF LIVING COUNCIL FREEZE REGULATIONS

Special Freeze Group Questions and Answers No. 8

"12. Q. Are finance charges frozen?

"A. No. Finance charges are interest rates and are exempt from the freeze."
39 Fed. Reg. 17191 (1973).

CLC Phase IV Price Ruling 73-16

APPENDIX - PHASE IV PRICE RULINGS

"Facts. Company A, a commercial bank, proposes to add a provision to its mortgage contracts which requires a borrower to pay a penalty fee in the event he pays on his mortgage loan prematurely during the first few years of the loan.

"Issue. How is the proposed fee controlled under the Phase IV Economic Stabilization Regulations?

"Ruling. The fee is a finance charge, not a price, and is therefore not subject to the price regulations. . . . For the purposes of the Economic Stabilization Program, 'finance charges' include the charges defined as finance charges in §106(a) of the Truth in Lending Act, 15 U.S.C. 1605(a). . . . These finance charges include charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extention of credit, including any of the following types of charges which are applicable:

"(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charge.

"(2) Service or carrying charge.

"(3) Loan fee, finder's fee, or similar charge.

"(4) Fee for an investigation or credit report.

"Therefore the charge to be instituted by Company A is exempt from the price rules of the Economic Stabilization Program.

"This ruling adopts the same position taken in Cost of Living Council Ruling 1972-74 (Price Commission Ruling 1972-203) with reference to the definition of a finance charge." 38 Fed.Reg. 33189 (1973).

MANDATORY PETROLEUM PRICE REGULATIONS

Rent Charged For Real Property Used in the Retailing of Gasoline

". . . The leasing of property used in the retailing of gasoline, between suppliers and retailers, is inextricably woven into the fabric of the supplier's marketing system and is directly related to the price at which gasoline is sold at retail. The price charged for product and the rent charged for the property, each of which is often expressed as a flat rate in cents per gallon, constitute a combined charge to the retailer by the supplier for the purchasing and retailing of gasoline. FEO has determined that the statutory mandate to regulate the price of refined petroleum products requires the continued regulation of rents charged between retailers and suppliers in service station leases, as an integral part of its petroleum pricing regulations."
39 Fed.Reg. 15139-15140 (1974).

Ruling 1974-10

APPENDIX - FEO RULINGS

Changes in Credit Terms

"Facts. Firm A, a refiner, sold gasoline to Firm B on May 15, 1973, under terms which permitted Firm B to pay for a delivery of gasoline at the time the next delivery was made.

"Firm C, a refiner, sold gasoline to Firm D on May 15, 1973, under terms which

included a requirement that Firm D make a cash deposit with Firm C as security for prompt payment for the gasoline sold by Firm C to Firm D. The amount of the deposit required of Firm D depended upon Firm D's credit rating and the amount of credit Firm D obtained, which in turn depended upon the volume of purchases, the frequency of payments, and on the price of the gasoline that was purchased.

"Issue 1. May Firm A now require Firm B, which has been paying for deliveries of gasoline on a so-called load-to-load basis, to pay for each delivery at the time it is made?

"Issue 2. May Firm C increase the amount of the security deposit required from Firm D?

"Ruling. Firm A may not discontinue its practice of accepting payment for deliveries of gasoline on a load-to-load basis. 10 C.F.R. 212.82(f)(1)(i) states: 'The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transaction with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the months of May 1973 and measured pursuant to the provisions of Section 212.83. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.' Price is defined in 10 C.F.R. 212.31 as 'any consideration for the sale or lease of any property or service and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.'

"Thus, the May 15, 1973 price includes both the price per gallon of gasoline and the time within which that price had to be paid, i.e., the credit terms that prevailed on that date. The imposition of more stringent credit terms by a refiner would constitute an unpermissible increase in the May 15, 1973 price because it would reduce the time within which payments had to be made. The cost of credit for the period between deliveries, which was incurred by Firm A would, if the terms could now be altered, have to be paid by Firm B.

"Firm A could change its credit practices with respect to Firm B only if it first applied to the FEO, and made a showing as to why the change was necessary, and if the FEO authorized the change, as well as an appropriate adjustment to Firm A's May 15, 1973 price. The presumption, however, would be against authorizing such changes in credit terms because of the differing impact they have on Firm A and Firm B because of their differing access to and cost of obtaining credit.

"Firm C can increase the amount of the security deposit it requires, but only to the extent that the actual increase in the amount of the security deposit is justified by increased credit being extended to each retail seller because of increases in the price of gasoline or in the volume of purchase. Thus, the percentage increase in the amount of the security deposit required of Firm D can be, at most, the percentage by which the selling price of gasoline to Firm D has increased between May 15, 1973, and the present, adjusted for changes in volume of purchases between May

15, 1973, and the present. Any further increase would be an impermissible increase in Firm C's May 15, 1973 selling price, since it would impose an increased cost of credit on Firm D. Similarly, Firm C could not increase the frequency of payments required of Firm D because to do so would reduce the amount of credit being extended to Firm D." 39 Fed.Reg. 15140 (1974).

Excerpt from FEA's Reply Brief, Page 3, in Shell Oil Company v. Federal Energy Administration, T.E.C.A. No. 5-13

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 5-13

Shell Oil Company,
Plaintiff-Appellee

v.

Federal Energy Administration, et al.
Defendants-Appellees

REPLY BRIEF FOR APPELLANTS

(Filed October 10, 1975)

"While the FEA does not know whether Shell would attempt to disguise price increases on motor gasoline sales through rental increases, the agency has determined that, as with the control of credit terms, FEA's rental regulations constitute the only effective and administratively feasible method of preventing industry wide circumvention of its price regulations." (Emphasis added, footnote omitted). Page 3, Reply Brief for Appellants.

Supreme Court, U. S.
FILED
APR 6 1977
MICHAEL RODAK, JR., CLERK

No. 76-1098

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARATHON OIL COMPANY, PETITIONER

v.

FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. 1a-17a) is reported at 547 F.2d 1140. The opinion and order of the United States District Court for the Northern District of Ohio (Pet. App. 18a-24a) have not been reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on December 6, 1976, and a

petition for rehearing, with a suggestion for rehearing *en banc*, was denied on January 10, 1977 (Pet. App. 17a). The petition for a writ of certiorari was filed on February 8, 1977. The jurisdiction of the Court is invoked under 15 U.S.C. (Supp. V) 754(a)(1), and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Emergency Petroleum Allocation Act of 1973 authorizes the Federal Energy Administration to regulate the credit terms and payment schedules used in sales of regulated petroleum products.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. 38a-49a.

STATEMENT

Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (the Allocation Act), 87 Stat. 627, 629, 15 U.S.C. (Supp. V) 753(a), provides in pertinent part:

> the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

Pursuant to that directive, the Federal Energy Administration,[1] has promulgated Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 210 through 212. The price regulations provide in essence that suppliers of allocated products may not charge any "class of purchaser" more than specified prices, usually determined as the price lawfully charged on May 15, 1973, plus certain amounts allowed to recover cost increases.[2] The regulations include a provision pertaining to "Normal Business Practices,"[3] 10 C.F.R. 210.62, which currently provides in pertinent part:

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[1] Regulations under the Allocation Act were first promulgated in January 1974 (see 39 Fed. Reg. 744, 1931) by the Federal Energy Office, to which the President had delegated his authority under the Allocation Act and portions of his authority under the Economic Stabilization Act of 1970. See Executive Order 11748, 38 Fed. Reg. 33575. The Federal Energy Administration was created on June 27, 1974, and assumed the responsibilities of the Federal Energy Office. Executive Order No. 11790, 39 Fed. Reg. 23185.

[2] See 10 C.F.R. 212.73, 212.82, 212.93.

[3] The Normal Business Practices regulation was first promulgated under the Allocation Act on January 2, 1974, and provided in pertinent part that "no supplier may require or impose discriminatively more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier * * *" (39 Fed. Reg. 748-749). Before it was to go into effect the regulation was revised on January 15, 1974, to provide in pertinent part that "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.*, COD purchasers) during the base period * * *" (39 Fed. Reg. 1931).

Suppliers will deal with purchasers of an allocated product according to normal business practices in effect during the base period specified in Part 211 for that allocated product, and no supplier may modify any normal business practice so as to result in the circumvention of any provision of this chapter. * * * Nothing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products, as customarily associated with that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms). However, no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms).[4]

Petitioner filed this action in the United States District Court for the Northern District of Ohio to enjoin the enforcement of this regulation. The district court granted petitioner's motion for summary judgment, holding that the Allocation Act did not

[4] The regulations define "class of purchaser" as "purchasers to whom a person has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers" (10 C.F.R. 212.31). "Customary price differential," in turn, is defined as "includ[ing] a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery" (*ibid.*).

authorize FEA to regulate credit terms in the sale of allocated products (Pet. App. 18a-24a).[5]

The Temporary Emergency Court of Appeals reversed. The court recognized that the regulation of credit terms and other business practices in the sale of allocated products was "tied closely" to the regulation of prices (Pet. App. 7a) and that the authority for such regulation was fairly implied in the broad statutory mandate of Section 4(a) of the Allocation Act (Pet. App. 13a). Moreover, on the basis of its review of the legislative history of the Economic Stabilization Act of 1970 and the Allocation Act and the regulations promulgated under both, the court concluded that Congress intended that FEA continue to exercise the authority, formerly exercised by the Cost of Living Council, to regulate credit terms (Pet. App. 8a-12a).[6]

[5] Petitioner also challenged another regulation, concerning the rental of real property. The district court concluded that that regulation also was invalid, relying upon the decisions of the Temporary Emergency Court of Appeals in *Shell Oil Co.* v. *Federal Energy Administration*, 527 F. 2d 1243, and *Atlantic Richfield Co.* v. *Zarb*, 532 F. 2d 1363. No appeal was taken from that portion of the judgment.

[6] As the court of appeals outlined in its opinion (Pet. App. 8a-10a), the FEA's credit regulation was a continuation of regulations promulgated for petroleum products by the Cost of Living Council during Phase IV of the Economic Stabilization Act of 1970. Although the CLC did not generally regulate interest rates and credit terms under the Stabilization Act, it did so with petroleum products through its "class of purchaser" rules, which were largely incorporated in the FEA's allocation and price rules. Under the CLC regulations, as under FEA's regulations, a "class of purchaser" was defined as a purchaser who had been charged "a comparable price for

Finally, the court held that its decisions in *Shell Oil Co.* v. *Federal Energy Administration*, 527 F. 2d 1243 (T.E.C.A.), and *Atlantic Richfield Co.* v. *Zarb*, 532 F. 2d 1363 (T.E.C.A.), holding that FEA was without authority to regulate real estate rentals, did not establish the invalidity of the credit regulation, since "[c]redit terms are more clearly a function of pricing and allocation than service station rentals" (Pet. App. 15a-16a).

The court remanded the case to the district court for further consideration of issues relating to the validity of the provisions in 10 C.F.R. 210.62(a) specifically concerning "summer fill" and other "dating" practices, which the district court had not addressed (Pet. App. 16a).[7] The court denied a petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. 17a).

ARGUMENT

The Temporary Emergency Court of Appeals correctly held that the Allocation Act authorizes the

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comparable property or service pursuant to customary price differentials between those purchasers * * * and other purchasers." 6 C.F.R. 150.352 (1974); 10 C.F.R. 212.31 (1976). "Customary price differential" in turn was defined as a "price distinction based on [*inter alia*] a term or condition of sale or delivery" (6 C.F.R. 150.31 (1974)). See also 10 C.F.R. 212.31 (1976).

[7] The district court apparently concluded that those provisions were part of the regulation of terms of credit and, having found that FEA was without authority to regulate credit terms, determined that they were invalid (Pet. App. 21a).

FEA to regulate credit terms offered by suppliers in the sale of allocated petroleum products. There is no conflict on this issue among the circuits or within the Temporary Emergency Court of Appeals. Indeed, the latter court denied petitioner's suggestion for rehearing *en banc* based on an alleged conflict. The Temporary Emergency Court of Appeals was specially established by Congress to decide questions arising under, *inter alia*, the Allocation Act, and the decision below was based on that court's special familiarity with the Act and its administration. The decision affirms a reasonable interpretation of the Act by the agency established to administer it and does not warrant further review.

1. Section 4(a) of the Allocation Act constitutes a broad authorization and directive to allocate petroleum products and, in connection with the allocation, to regulate the prices of allocated products. The statute speaks broadly of "prices specified in (or determined in a manner prescribed by) such regulation."

Congress recognized that the regulation of price is critical to the effective allocation of petroleum products in times of severe shortage and that regulatory authority should be broadly construed to effectuate the declared statutory purpose "of minimizing the adverse impacts of such shortages and dislocations on the American people and the domestic economy." 15 U.S.C. (Supp. V) 751(b). *Cities Service Co.* v. *Federal Energy Administration*, 529 F. 2d 1016 (T.E.C.A.), certiorari denied, 426 U.S. 947;

Condor Operating Co. v. *Sawhill*, 514 F. 2d 351 (T.E.C.A.), certiorari denied, 421 U.S. 976.

As the court below correctly held (Pet. App. 13a-14a), the authority to regulate credit and other terms in the sale of allocated products is necessary to regulate effectively the price of allocated products and is implicit in the authority to regulate prices. Credit terms and payment schedules are inseparably related to the listed price of a product; together they constitute the consideration for the product. Changes in credit terms are functionally equivalent to changes in price and have largely the same capacity to disrupt the allocation of products and to cause dislocations in the economy.

Consider a supplier who in May 1973 permitted a class of purchasers to pay for products 30 days after delivery without interest. For that supplier now to require that class of purchasers to pay "interest" at the rate of 12 percent per annum on payments made after delivery would be functionally equivalent to raising the price one per cent and then offering a one percent discount to those who pay on delivery. To the extent a purchaser's cash flow or other circumstances make it impracticable for him to pay on delivery, the imposition of an interest charge for what was formerly a customary allowance constitutes an effective increase in price for the product.[8]

[8] Even if the purchaser can resort to the credit market to enable him to pay cash on delivery, what he would effectively pay for the product would be the May 1973 price plus the interest expense incurred.

Furthermore, in the case of purchasers whose businesses have developed in reliance on the supplier and his customary credit terms and payment schedules, changes in those terms and schedules may disrupt the supply of the product as completely as would a severe increase in price.

Petitioner argues (Pet. 13-14) that credit (of which payment schedules are an aspect) is fungible, that a purchaser can resort to the credit market when the supplier imposes credit terms and payment schedules in excess of the going rate for credit, and therefore that credit is separate from and unrelated to the price of allocated products. That argument ignores, first, the realities of the industry, in which credit terms and payment schedules furnished by the supplier are an integral part of the distribution system. As petitioner itself stresses, "[v]irtually every seller of crude oil or petroleum products enters into some form of credit transaction with his purchasers" (Pet. 7). Since credit arrangements between sellers and purchasers pervade the distribution system, it is unrealistic to contend that "customers would always have the option of obtaining credit in the open market and paying cash to the seller for any products purchased" (Pet. 14).

Second, the argument ignores the nature of the credit offered by a seller in connection with the sale of his product. That credit is not fungible in the sense that it is equally available, on the same terms, from independent lenders. Rather, when a supplier offers some form of credit (*e.g.*, the privilege to defer payment for 30 days after delivery) in connec-

tion with the sale of his product, it is offered as an inducement to encourage or facilitate the purchase and thus ordinarily is offered on terms more favorable than those available in the credit market generally. In short, credit terms are an integral part of the consideration for which the purchase price is paid.

Petitioner relies (Pet. 8-9) on *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, for the proposition that credit is unrelated to price. In fact, for purposes of the issue here, that decision establishes precisely the opposite. There, the Court held that when a company lends money at favorable rates to a borrower for the purchase of real estate on condition that the borrower buy some of the company's pre-fabricated houses, the transaction constitutes an illegal tying arrangement involving two products—credit and pre-fabricated houses. However, the Court emphasized that its holding would not affect the ordinary credit sale, where the credit is offered in connection with the product sold, saying, "In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product." 394 U.S. at 507.[9] The regulation here is concerned only with

[9] Petitioner's further reliance (Pet. 9) on *Craig* v. *Sun Oil Co.*, 515 F. 2d 221 (C.A. 10), also is unfounded. There the plaintiff alleged that the defendant had given plaintiff's competitor more favorable credit terms than plaintiff had been given, in violation of the Robinson-Patman Act, 15 U.S.C. 13. The court rejected the allegations primarily on the ground that "[i]t is clear that the allegations of price discrimination are based on several billing errors made by Sun, but which were corrected." 515 F. 2d at 224. The court went on to express the view that discrimination in credit terms usually would not constitute a violation, since differences in credit are based on numerous judgmental factors, but stressed that in some circumstances discrimination in credit of sufficient magnitude or nature might constitute a violation.

credit terms in connection with the sale of allocated products; it does not purport to regulate credit arrangements which are unrelated to sale of allocated products.[10]

2. Although the Allocation Act does not expressly refer to credit terms or payment schedules in its delegation of authority, it is well settled that a broad congressional delegation of authority to an administrative agency confers the authority to issue regulations which are necessary and proper to the effectuation of the statutory purpose. This Court noted in the *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-777:

> This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; * * *. We cannot, in these circumstances, conclude that Congress has given authority in-

[10] A wide variety of credit arrangements are employed in the sale of allocated petroleum. Whether particular credit arrangements are related to the sale of allocated products and thus fall within the scope of the regulation are questions to be decided in each particular case on the basis of the circumstances involved, and not in the context of petitioner's broad challenge to the validity of the regulation. Similarly, whether or not FEA has incorrectly decided particular cases, as amici suggest (Am. Br. 7-8), is not at issue here.

adequate to achieve with reasonable effectiveness the purposes for which it has acted.

Those principles are particularly pertinent here, since the legislative history of the Allocation Act expressly reflects Congress' intent to afford the President "full flexibility in devising the most effective and efficient means of meeting the pricrity needs of the American people identified in section 4(b)" of the Act. H.R. Conf. Rep. No. 93-628, 93d Cong., 1st Sess., 12 (1973).

The agency charged with the administration of the Allocation Act has reasonably concluded that credit terms and payment schedules are inseparably related to the price of allocated products and that suppliers could disrupt the allocation of those products as readily by changing credit terms and payment schedules as by raising prices. In view of the express statutory authority to regulate allocation and prices, and the declared statutory purpose of minimizing "the adverse impacts of [petroleum] shortages and dislocations on the American people and the domestic economy," FEA's ancillary regulation of credit terms and payment schedules is within its statutory powers.[11]

---

[11] Petitioner and amici counter (Pet. 14; Am. Br. 13) that FEA can prevent attempts to disrupt allocations by changes in credit terms by resorting, on a case-by-case basis, to the general prohibition, contained in 10 C.F.R. 210.62(c), against practices designed to circumvent the regulations. However, since virtually every transaction involving petroleum products also involves credit terms which directly or indirectly influence the price, volume, and timing of such transactions, it would be an impossible burden for FEA to review the credit terms established in thousands of daily transactions to insure their consistency with the regulations.

3. As the court below correctly found, to the extent the legislative history of the Allocation Act illuminates the issue, it indicates Congress intended that FEA's regulations under the Act were to be patterned on earlier regulations of the Cost of Living Council (see Pet. App. 11a-12a). The CLC regulations with respect to petroleum products governed credit terms (see p. 5 and n.6, *supra*; see also Pet. App. 8a-10a).[12] There is nothing in the legislative history of the Allocation Act that suggests that Congress intended to confer a more limited authority on FEA, or to circumscribe its power to deal effectively with the allocation of scarce petroleum products in the manner suggested by petitioner.[13]

---

[12] Petitioner (Pet. 13) and amici (Am. Br. 14) dispute that fact by citing CLC rulings concerning products other than petroleum products. Those citations are inapposite to the scope of the CLC's petroleum regulations.

[13] Petitioner and amici (Pet. 3-4; Am. Br. 5) rely on the fact that Section 203(a) and (e) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 744, 745, expressly authorized the President to "stabilize prices, rents, wages, and salaries, * * * interest rates" and "finance charges." 12 U.S.C. (Supp. V) 1904, note. The court below correctly concluded (Pet. App. 12a-13a) that the absence of a similarly explicit reference to credit terms in the Allocation Act does not indicate a legislative intent to withhold from the President such authority to regulate credit agreements as is necessary effectively to regulate prices and implement the objectives of the Act. The reference in the Stabilization Act to interest rates and finance charges reflects Congress' broad purpose in that statute to counter inflation by stabilizing interest rates

4. Petitioner's contention (Pet. 9-12) that the decision below conflicts with the Temporary Emergency Court of Appeals' earlier decisions concerning regulation of real estate rentals in *Shell Oil Co.* v. *Federal Energy Administration*, *supra*, and *Atlantic Richfield Co.* v. *Zarb*, *supra*, was rejected expressly by a panel of that court and implicitly by the entire court when it denied petitioner's request for a rehearing *en banc*.

As the court emphasized in *Shell Oil Co.*, the regulations challenged in that case purported to regulate real estate rentals between suppliers and purchasers regardless of any relationship between the rental agreement and the purchase of allocated products, and they applied even where "a lessor of real property used for retailing gasoline is not in fact the supplier of the gasoline marketed at that location." 527 F. 2d at 1246. In contrast, the credit terms and payment schedules at issue here are directly related to sales of allocated products, and are thus, as the court below recognized (Pet. App. 16a), "a function of pricing and allocation" of the allocated products.[14]

---

generally. The fact that the Allocation Act has different objectives and used different language in reference to those objectives does not indicate a congressional intent to withhold authority necessary and appropriate to achieve those objectives. As the court below stated (Pet. App. 13a), "[d]etailed powers necessary or convenient to the allocation and pricing authority granted with reference to the petroleum industry did not have to be spelled out, for the Congress, as well as judges, was fully cognizant of the doctrine of implied powers."

[14] The court in *Shell Oil Co.* recognized that real estate rentals may in some cases be related to the allocation and price of petroleum products and that FEA has authority under the Act and its regulations (10 C.F.R. 210.62(c)) to restrain increases in rent that in fact are used to circumvent the allocation and price regulations.

5. Amici incorrectly suggest (Am. Br. 7-8, 11) that the regulation at issue here freezes credit terms in effect between suppliers and each of their purchasers and prohibits suppliers from exercising "contemporaneous judgments as to [their] individual customer's creditworthiness and need." The regulation expressly states that "[n]othing in this paragraph shall be construed to require suppliers to sell to purchasers who do not arrange proper credit or payments for allocated products * * *." 10 C.F.R. 210.62(a). The regulation thus provides suppliers flexibility to determine the appropriate credit and payment schedules for individual customers on the basis of judgments about creditworthiness and other related factors.

The regulation speaks in terms of "class of purchaser" and provides that "no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period." *Ibid.* Thus if a supplier in May 1973 had permitted a particular class of purchaser (*e.g.*, service stations) to pay sixty days after delivery, but had required certain stations within the class to pay more promptly based on creditworthiness or other nondiscriminatory factors, the regulation affords that supplier flexibility to adjust its credit arrangements with particular purchasers based on the same factors that had been applied in the base period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
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October Term 1976
No. 76-1098

MARATHON OIL COMPANY,
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vs.

FEDERAL ENERGY ADMINISTRATION, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To the Temporary Emergency Court of Appeals
of the United States

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In their brief in opposition, Respondents seem to concede the basic merits of Petitioner's contentions. They seek to avoid the effect of such concessions, however, by assumptions, inferences and conclusions which are unwarranted, unreasonable or unsupported in the record. For these reasons, Petitioner feels compelled to reply.

I.

Respondents concede that " * * * the Allocation Act does not expressly refer to credit terms or payment schedules in its delegation of authority * * * ". [Respondents' Brief, p. 11.] But they argue that

such authority must necessarily be inferred if frustration of the agency's allocation program is to be avoided. They argue that "suppliers could disrupt the allocation of those products as readily by changing credit terms and payment schedules as by raising prices." [Respondents' Brief, p. 12.]

Petitioner submits that there is no showing in the record that increases in the price of credit would any more "disrupt the allocation" of products than would increases in the price of rent or any other cost of doing business. As a matter of fact, the opposite is true. Furthermore, the court below itself ruled in Shell Oil Co. v. Federal Energy Administration, 527 F.2d 1243 (T.E.C.A. 1975), that such a resulting frustration of the allocation program was no ground for regulating rent as an inseparable part of price.

The fallacy of Respondents' argument is made pointedly clear by a consideration of the effects of a refusal by a supplier to renew a lease to a customer. If a supplier refused to renew a lease to a dealer, for example, the dealer's allocation right could be effectively frustrated. Such was the situation in Guyer v. Cities Service Co., 381 F. Supp. 7 (E.D. Wis. 1974). There, in an opinion approved by the Court below in Atlantic-Richfield Co. v. Zarb, 532 F.2d 1363 (T.E.C.A. 1976), the district court held that the fact that the allocation rights of service station dealers might be frustrated by the termination of leases by their supplier did not warrant extending, by implication, the reach of the Emergency Petroleum Allocation Act (the Allocation Act) to an area not explicitly covered by the act.

By comparison, an increase in the cost of credit or the elimination of credit by a supplier could not have such an effect. The purchaser, by obtaining credit in the free credit market and paying cash for the allocated product, could continue to exercise his allocation rights.

II.

Respondents concede that " * * * the regulation affords [a] supplier flexibility to adjust its credit arrangements with particular purchasers [within the same class of purchasers] based on the same factors that had been applied in the base period". [Respondents' Brief, p. 15.] However, they argue that the supplier may only look backward at past credit practices and may not look currently at purchasers for the purpose of forming judgments as to present "credit worthiness or other nondiscriminatory factors * * * ."

This is totally unrealistic and arbitrary. It necessarily means that the seller must adhere to past credit terms no matter how unworthy a customer may have become since 1973 and no matter what "other nondiscriminatory factors" might currently exist or arise in the future.

Respondents' attempt to regulate credit as a part of product price is nothing more than an administrative maneuver to shift the burden of proof from the agency to the industry. In other words, each and every new judgment requiring more stringent credit terms is presumed to be in violation of the regulation, unless and until the seller proves otherwise.

Even the court below has declined to condone such arrogance. In the Shell case, that court told the government in no uncertain terms that the burden of proof remained with the agency under its enforcement powers to establish that rental adjustments had been used as a means of circumventing the pricing regulations of the Allocation Act. This Court should do no less with respect to credit terms.

III.

Respondents concede that the regulations preclude the industry from meeting fairly and competitively the normal fluctuations which occur in an uncontrolled credit market. [Respondents' Brief, pp 9, 10.] They argue, however, that such inequity is justified because of the historical practice of the petroleum industry to extend more favorable credit terms than its purchasers could obtain in the open credit market. There is absolutely no support in the record on appeal for this assertion and it is an unwarranted assumption.

IV.

Respondents' effort to distinguish Craig v. Sun Oil Co. [Respondents' Brief, Note #9, pp. 10, 11] is in fact self-defeating. The court there made eminently clear that only discrimination in credit terms "of sufficient magnitude or nature" might constitute a violation of the Robinson-Patman Act, but that differences of ordinary proportions would not.

This is Petitioner's precise point in the instant case. If, given sufficient economic power over credit, inordinate credit terms were imposed "of

sufficient magnitude or nature" as to constitute a circumvention of the F.E.A.'s pricing authority, then such action might "constitute an action" warranting enforcement proceedings by the agency. But Respondents, in seeking to require the industry to justify every minute adjustment in credit terms, are putting the cart before the horse. Moreover, their theory would result in precisely the same sort of administrative difficulties they imagine would be presented by Petitioner's contention that Respondents should resort to the general prohibition in 10 C.F.R. Section 210.62(c) against practices designed to circumvent the regulations.

Respondents' basic premise is that the F.E.A. must regulate credit terms in order adequately to regulate the prices of covered products. They attempt to demonstrate this theory by example: "Consider a supplier who in May, 1973 permitted a class of purchasers to pay for products thirty days after delivery without interest. For that supplier now to require that class of purchasers to pay 'interest' at the rate of 12% per annum on payment made after delivery is functionally equivalent to raising the price 1% and offering a 1% discount to those who pay on delivery. To the extent a purchaser's cash flow or other circumstances make it impractical for him to pay on delivery, the imposition of an interest charge for what was formerly a customary allowance constitutes an effective increase in price for the product." [Respondents' Brief, p. 8.]

This example implies, however, that the converse would be true. For example, a supplier could in 1977 offer to a class of purchasers substantially less

stringent credit terms than during the 1973 base period. Under Respondents' rationale, the supplier could raise the price of the product above the ceiling price by an amount corresponding to the economic equivalent of the reduction in the base period credit terms.

This certainly would be a logical extension of the Respondents' theory that product price and credit terms are inseparable for regulatory purposes. However, if this extension is justified, then the F.E.A. would be required to examine every price change on an ad hoc basis to insure consistency with the accompanying changes in credit. This is precisely the sort of case-by-case review Respondents seek to avoid.

V.

Respondents assert that the challenged regulation deals only with credit terms related to the sale of allocated products. [Respondents' Brief, pp. 10 through 11 and 14.] But they then say that a wide assortment of credit arrangements are used in such sales. [Respondents' Brief, Note #10, p. 11.] It is unclear whether Respondents intend to abandon their contention in both courts below that the challenged regulation encompasses all credit transactions within the industry, whether connected with the sale of covered products or otherwise. Their failure to address this issue in unambiguous terms may have to be viewed as an effort to camouflage their true position and to mislead the Court as to the asserted scope of the challenged regulation.

CONCLUSION

For these additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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OCTOBER TERM, 1976

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF OF NATIONAL PETROLEUM REFINERS ASSOCIATION, AMOCO OIL COMPANY, ASHLAND OIL, INC., CITIES SERVICE COMPANY, CONTINENTAL OIL COMPANY, EXXON CORPORATION, GETTY REFINING AND MARKETING COMPANY, GULF OIL CORPORATION, KERR-McGEE CORPORATION, MAPCO, INC., MOBIL OIL CORPORATION, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, TEXACO, INC., AND UNION OIL COMPANY AS AMICI CURIAE IN SUPPORT OF THE PETITION

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National Petroleum Refiners Association, Amoco Oil Company, Ashland Oil, Inc., Cities Service Company, Continental Oil Company, Exxon Corporation, Getty Refining and Marketing Company, Gulf Oil Corporation, Kerr-McGee Corporation, MAPCO, Inc., Mobil Oil

Corporation, Phillips Petroleum Company, Shell Oil Company, Texaco, Inc., and Union Oil Company file this brief as *amici curiae* to urge that the Court grant the petition for a writ of certiorari to review the decision of the Temporary Emergency Court of Appeals entered in this case on December 6, 1976. All parties to this action have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

National Petroleum Refiners Association is an association whose membership is comprised of virtually all domestic refiners. The remaining *amici curiae* are suppliers of petroleum products and therefore are subject to the Petroleum Allocation and Price Regulations administered by respondent Federal Energy Administration (hereinafter referred to as "FEA") pursuant to the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§751-760h (Supp. V 1975) (hereinafter referred to as the "Allocation Act").

The restriction upon credit terms imposed by FEA in 10 C.F.R. §210.62(a) (1976) sharply curtails the ability of all sellers of crude oil and refined petroleum products to adopt rational and economically sensible credit policies in response to current credit market conditions. These sellers are bound by FEA's regulation to follow historical credit policies formulated under conditions prevailing four years ago. The regulation in question is not the exercise of a "limited power necessarily implied for the exercise of the authority expressly granted," as the court below described the agency power in question

(Pet. 13a).[1] On the contrary, FEA stated in the court below that the regulation is intended to cover a "wide variety of practices," such as, "the right to delayed payment, the use of credit cards, the right to a discount for early payment, the right to require a letter of credit or security deposit, the right to charge interest for overdue payments, the right to a free delivery or other special deal including, for example, general loan arrangements such as construction loans for the improvement of service station property." Brief for Appellant in *Marathon Oil Co.* v. FEA, T.E.C.A. No. 6-11, pp. 9-10 (Footnotes omitted).

Amici curiae believe that FEA's broad assertion of implied power to regulate credit terms extends far beyond any authority granted in the Allocation Act. If allowed to stand, FEA would have power to control virtually every aspect of each of hundreds of thousands of credit relationships. It is this assertion by FEA of implied power, and the consequent disruption that has occurred and will increasingly be felt in the market place for petroleum products, that has led *amici curiae* to urge their views before the Court.

---

[1] The following abbreviations are used in the citations herein:

"Pet. ___" refers to the Petition for Writ of Certiorari filed by Marathon Oil Company in this case on February 8, 1977.

"R. ___" refers to the Stipulated Record on Appeal filed by the parties to this case in the court below.

STATEMENT

1. The Regulation at Issue.

The critical provision in the regulation challenged by petitioner Marathon Oil Company is the following:

> . . . no supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchasers during the base period (for seasonal credit) or on May 15, 1973 (for other credit).[2]

[2] 10 C.F.R. §210.62(a) (1976). The "base period" referred to in the quoted provision is defined by FEA in a different manner for different petroleum products. The "base period" for motor gasoline, for example, is defined as "the month of 1972 corresponding to the current month." 10 C.F.R. §211.102 (1976).

This provision was issued on June 17, 1974 as part of a policy announcement regarding " 'Summer Fill' and other 'Dating Programs'." 39 Fed. Reg. 22121 (June 20, 1974). "Summer Fill" programs are programs that were offered by a number of heating oil suppliers in 1972 under which customers could obtain credit and price advantages by purchasing home heating oil during the summer months and storing it for resale the following winter. Some terms offered in these programs were credit terms (e.g. the right to delay payment for product delivered in May) and some were not (e.g., agreements by suppliers to hold the price of heating fuels constant for customers who elect to purchase in accordance with the program).

Amici curiae believe that the question whether FEA had authority to adopt its policy regarding credit terms offered in "Summer Fill" programs, although fairly comprised within the question presented for review, is somewhat different from the question whether the Allocation Act can be construed to grant FEA plenary power to regulate credit extended in connection with sales of allocated products in the manner set forth in the agency's present regulation. This brief specifically discusses only the latter question.

A predecessor credit regulation, issued on January 14, 1974, less than two months after the enactment of the Allocation Act, provided in pertinent part:[3]

> . . . no supplier may require or impose more stringent credit terms or payment schedules on purchasers than the normal business practice of the supplier for that class of purchaser (*e.g.* COD purchasers) during the base period . . .

Both versions were adopted as part of comprehensive regulations issued pursuant to Section 4(a) of the Act, which directs that a regulation be promulgated to provide for mandatory allocation of petroleum products "in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or in a manner prescribed by) such regulation" (15 U.S.C. §753(a) (Supp. V 1975)). The Allocation Act expressly grants no other regulatory powers.

In adopting the initial credit provision, the Federal Energy Office (FEA's predecessor agency) invoked not only the powers granted in the Allocation Act itself, but also powers that Congress previously had granted in the Economic Stabilization Act of 1970, as amended, formerly 12 U.S.C. §1904 note (Supp. V 1975). That Act did contain an express grant of the power to stabilize "interest rates" as well as "prices, rents, wages, and salaries" (*ibid*). Its purpose, unlike the Allocation Act, was to grant the President broad authority to "counter severe inflation that threatened the national economy" (*Fry* v. *United States*, 421 U.S. 542, 548 (1975). All powers granted in the Stabilization Act, however, expired on April 30, 1974, three and a half

[3] 39 Fed. Reg. 1931 (January 15, 1974).

months after the regulations under the Allocation Act were first adopted.

In no regulation prior to the comprehensive allocation program published by the Federal Energy Office on January 15, 1974, had the President or any of his delegates found it necessary to freeze credit terms in the manner set forth in 10 C.F.R. §210.62(a). In fact, the Cost of Living Council (hereinafter "CLC"), the agency to which all Stabilization Act powers were delegated, had expressly disclaimed the need to control credit terms in connection with its price controls.[4] Moreover, even the Mandatory Petroleum Allocation Regulations first issued after enactment of the Allocation Act prohibited only the imposition of "*discriminatively* more stringent credit terms . . . *than the normal business practice of the supplier*," and did not purport to control credit terms by reference to previously followed practices.[5]

Although comprehensive in its scope, the present credit regulation nevertheless is not certain in its meaning, and despite the fact that criminal sanctions can be invoked for willful violations,[6] the regulation provides no guidance in many situations as to the credit terms it permits. The record contains the affidavit of Marathon's

[4]CLC Ruling 1972-73, 37 Fed. Reg. 13278 (July 6, 1972); CLC Phase IV Price Ruling, 73-16, 38 Fed. Reg. 33489 (December 5, 1973); Special Freeze Group "Questions and Answers" No. 8, 38 Fed. Reg. 17490 (July 2, 1973).

[5]39 Fed. Reg. 749 (January 2, 1974) (emphasis added). No explanation has ever been given by the agency for the changes made in its credit regulations between January 2 and January 15, 1974.

[6]Section 5(a)(3)(B) of the Allocation Act, as amended, 15 U.S.C. §754 (a)(3)(B) (Supp. V 1975)).

credit manager, Mr. G. E. Johnston, for example, which sets forth the various types of credit terms employed by Marathon (R. 143-45). As Mr. Johnston's affidavit states, the credit terms "actually made available to particular customers within a given class of trade for a particular product will vary depending upon a number of factors" including Marathon's evaluation of the "ability and willingness of the customer to pay" and the "needs of its customers" (R. 147). Because of the myriad of variables that bear upon credit decisions but have no relationship to pricing, it is not unusual that a given "class of purchasers," which sellers are required to establish on the basis of "price distinctions,"[7] includes purchasers that have been extended comparable prices, but widely varying "credit terms."[8] In many situations, there thus are no definitive credit terms marking the limits of stringency which the regulation purports to impose.

The rulings and decisions which FEA has issued with respect to changes in credit terms have not served to clarify the meaning of its regulation. In these instances, FEA often seems to apply the regulation in a manner which looks only to credit terms offered to a particular purchaser and not, as the provisions in its regulation require, to the terms in effect at these times for the

[7]10 C.F.R. §212.31 (1976).

[8]For example, a given "class of purchasers", all of whom have paid "a comparable price for comparable property or service" (see 10 C.F.R. §212.31 (1976)), commonly includes both cash and credit accounts. See Johnston Affidavit, R. 153.

class to which the purchasers may belong.[9] Accordingly, sellers of petroleum products presently find themselves under a regulation that FEA may interpret as requiring agency approval for any change in any credit term that is questioned by the purchaser affected.

2. Proceedings below.

Marathon commenced this action in August 1974. Its complaint sought relief from the "provisions of the regulations of defendant FEA pertaining to rents and credit terms" (R. 301). In November 1975, while this action was pending in the district court, the Temporary Emergency Court of Appeals decided *Shell Oil Company* v. *FEA*, 527 F.2d 1243 (1975), holding that FEA's regulations pertaining to rent exceeded FEA's authority and thus were invalid. Shortly thereafter Marathon, relying upon the *Shell* decision, moved for summary judgment with respect to both FEA's rent and credit regulations.

While conceding the invalidity of its rent regulation, FEA maintained that the validity of its credit regulation was not "dealt with in the *Shell* case" (R. 161). FEA

[9] *Compare* FEA Ruling 1974-10, 39 Fed. Reg. 15140 (May 1, 1974), CCH Energy Management ¶16,020 *with* FEA Ruling 1975-13, 40 Fed. Reg. 40831 (September 4, 1975), CCH Energy Management ¶16,053; *See also, Coastal States Marketing, Inc.*, 1974 CCH Energy Management Transfer Binder ¶20,664 (September 24, 1974); *Texas City Refining, Inc.*, 1974 CCH Energy Management Transfer Binder ¶20,737 (December 11, 1974); *Crystal Oil Co.*, 1974 CCH Energy Management Transfer Binder ¶20,161 (October 8, 1974); *Bill's Service*, 1976 CCH Energy Management Transfer Binder ¶80,548 (January 15, 1976).

therefore filed a cross-motion for summary judgment upholding its credit regulation and in support thereof relied upon the affidavit of Mr. Ottie T. Vipperman, Jr., then Director of Price and Allocation Policy for FEA (R. 193-258).

The district court held for Marathon and ruled that "10 C.F.R. §210.62(a) is invalid as beyond the scope of the authority granted by [the Allocation Act] to the extent that it regulates the credit terms which a supplier of petroleum products may apply to a purchaser of said products" (R. 3).

The Temporary Emergency Court of Appeals on appeal by FEA reversed "the summary judgment granted by the district court" (Pet. 16a). The court did not, however, instruct the district court to enter judgment in favor of respondents, but remanded the case for further proceedings not inconsistent with its opinion.[10]

REASONS FOR GRANTING THE WRIT

The judgment of the district court in this case reflects established and proper standards for judicial

[10] One reason for the remand, stated in the appellate court's opinion (see Pet. 16a-17a), was to permit the district court to consider in the first instance Marathon's contentions that FEA's credit regulations did not comply with Sections 4(b)(2)(A) and 4(b)(2)(C) of the Allocation Act, 15 U.S.C. §§753(b)(2)(A) and 753(b)(2)(C) (Supp. V 1975). The appellate court's mandate, however, also leaves the district court to proceed with an evidentiary trial of the issues of fact raised by Marathon's contention that the present FEA credit regulation exceeds the limited power which the appellate court found "necessarily implied for the exercise of the authority expressly granted [to FEA]" (Pet. 13a).

review of agency action and accurately perceives the intent of Congress as expressed in the Allocation Act. The district court thus correctly invalidated FEA's credit regulation as an attempt by FEA to go beyond its statutory authority and exercise regulatory control over an economic mechanism which Congress did not see fit to entrust to the agency. The Temporary Emergency Court of Appeals reversed this judgment. Its holding, however, is based upon an uncritical reliance upon conclusions stated in a litigation affidavit submitted by the agency and upon a complete misreading of the relevant legislative history. The appellate court also rested its judgment upon a "rule of deference" to agency action (Pet. 16a) which has no place in the judicial review of an agency whose powers are so expressly limited as those granted in the Allocation Act. Review of this case is necessary, therefore, not only to reinstate the district court's correct resolution of the important question presented, but also to establish proper standards of judicial review under which a legislative intent to limit a grant of power can be recognized and effectuated by the courts.

The express language of the Allocation Act grants no power over credit terms. In fact, the legislative history demonstrates that the overriding purpose of the statute was to effect the establishment of a system for allocating petroleum products and that the power to control price granted in Section 4(a) was included "on the premise that it does no good to require the allocation of products if sellers are then permitted to demand unfair and unrealistic prices." H.R. Rep. No. 93-628, 93d Cong., 1st Sess. 25 (1973). Even the power to control price, therefore, was intended by Congress only as power necessary but subservient to the allocation program mandated by the Act.

The Act sets forth specific means by which it directs the executive to deal with a specific problem. It would be hard to imagine a clearer expression of legislative intent to limit the powers vested in an administrative agency. Congress itself described the power granted in the Act as "specific temporary authority" (Section 2(b), 15 U.S.C. §751(b) (Supp. V. 1975)) and directed that it be exercised in a carefully circumscribed manner (*see* Sections 4(b) and (c), 15 U.S.C. §753(b) and (c) (Supp. V. 1975)). Included among the limitations imposed are express directions that the authority granted therein be exercised to provide, to the maximum extent practicable, for the following (Section 4(b)(1), 15 U.S.C. §753(b)(1) (Supp. V 1975)):

> (H) economic efficiency; and
>
> (I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Particularly in light of these explicit policy limitations, *amici curiae* urge that the court below erred in holding that the express authority to control the economic mechanism of price can necessarily imply authority over the very different economic mechanism of credit. The price at which a commodity is exchanged can be an important determinant of the economic use for which the commodity is employed and the amount allocated to each use. The credit terms agreed upon by a seller and purchaser, by contrast, are related to prevailing capital costs and to contemporaneous judgments as to the individual customer's creditworthiness and need (see R. 152-153).[11]

[11]This distinction between price and credit underlies the holdings that price discrimination prohibited by the Robinson-Patman Act will not be inferred from mere differences in the terms on which a supplier has extended credit to two purchasers. *See, e.g., Craig* v. *Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975); *Lang's Bowlerama, Inc.* v. *AMF, Inc.*, 377 F. Supp. 405, 408-09 (D.R.I. 1974); *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959).

The inference drawn by the court below of a congressional intent to confer power over credit terms was based primarily upon the court's reading of a House committee reference to a "'proposed mandatory allocation program of similar scope to that called for in this [allocation] bill,'" (Pet. 12a, fn. 12). As the court explained, the program "referred to obviously is the EPO's Proposed Mandatory Fuel Allocation Program... (38 Fed. Reg. 21797 (Aug. 13, 1973))" (*ibid.*).

The "EPO's Proposed Mandatory Fuel Allocation Program," however, had no provision similar to the broad regulation of credit terms subsequently adopted by the Federal Energy Office after passage of the Allocation Act. That program contained only the following provision concerning credit terms:[12]

> ...a supplier may not require or impose credit terms or payment schedules on wholesale purchase more stringent than the supplier's normal business practice during the first half of 1972, *other than are common under current market conditions (such as higher interest rates).*

If the House Committee Report, so heavily relied upon by the court below, can be construed as expressing any intention regarding power over credit terms in the allocation bill under consideration, it can only be read to demonstrate that the committee envisaged a very limited power to prevent credit terms in the petroleum industry from rising above whatever "current market conditions" from time to time might exist. This provision is no more than a

[12]38 Fed. Reg. 21802 (August 13, 1973) (emphasis added).

prohibition upon the use of credit terms as a device or scheme to circumvent the price provisions in the allocation program, since the imposition of credit terms that exceed current market conditions might suggest that in lieu of a higher price the purchaser was induced to forego other, more favorable, terms available in the credit market. The credit provision in the proposed program, to which the House Committee referred, is not an attempt generally to control credit terms such as that subsequently adopted by the Federal Energy Office and challenged by Marathon in the instant case.

The district court in this case correctly recognized FEA's credit regulation as an unlawful attempt by FEA generally to regulate credit as well as price in connection with the sale of petroleum products. Since the regulation imposes its strictures upon a seller's credit terms even in cases where the seller's prices are below the lawful ceiling prices, the regulation cannot be rationalized as a rule necessary to prevent circumvention. In fact, were circumvention the sole concern, the credit regulation would be superfluous, since 10 C.F.R. §210.62(c) generally prohibits "[a]ny practice which constitutes a means to obtain a price higher than is permitted by the regulations...."

FEA attempts to support its assumption of plenary power to regulate credit by relying upon the affidavit of its then Director of Price and Allocation Policy, Mr. O. T. Vipperman (R. 193-258). Two assertions in this affidavit bear upon FEA's control of credit terms. These assertions, which the court below cited in its opinion (Pet. 10a-11a), are (1) that FEA's credit regulation only made explicit a control over credit that was implicit in earlier price regulations of CLC under

the Stabilization Act[13] and (2) that there was a "likelihood" that credit terms might be used to circumvent the agency's mandatory price and allocation regulations. The record, however, contradicts Mr. Vipperman's affidavit on both points.

With regard to the assertion that control over credit terms was "implicit" in CLC price regulations, the record contains rulings by that agency which specifically stated that credit charges were exempt from its regulations.[14] On the assumed likelihood that

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[13]CLC's actions under the Stabilization Act are relevant to the question under review only to the extent that the court below interpreted the Allocation Act as providing for the continuation of all authority granted in the Stabilization Act. As the court itself recognized in the *Shell Oil* case, *supra*, however, the Allocation Act cannot properly be so interpreted.

[14]CLC Ruling 1972-73, R. 7-8, Special Freeze Group "Questions and Answers" No. 8, R.9; Phase IV Price Ruling 73-16, R.13, 29.:

CLC Ruling 1972-73 not only refutes Mr. Vipperman's claim that control over credit terms was implicit in the CLC price regulation, it explicitly states that credit terms were not controlled. The ruling posits the following situation:

> Company B is a clothing merchant. Company B currently bills customers on the first day of the following month for clothing purchased during the preceding month. The bills are payable in full within 10 days of receipt. Company B wishes to institute a revolving charge plan under which customers would be required to make monthly payments of 10 percent of the outstanding balance (or $20, whichever is larger) plus a carrying charge of 1-1/2 percent per month of the maximum outstanding monthly balance.

The issue considered by CLC – whether the "proposed charges by . . . Company B [would be] prohibited by the Economic Stabilization Regulations" – is answered in the negative.

petroleum suppliers might use credit terms to circumvent FEA's price regulations, Mr. Vipperman's affidavit is contradicted not only by the inherent limitations on such use of credit terms and, as noted *supra* p. 13, by the presence of other impediments to circumvention in the regulatory scheme, but also by the affidavit of Marathon's credit manager which states that "prices being charged for Marathon products have never been a consideration of the Credit Division in making decisions involving credit terms" (R. 151; see also R. 148).

The district court properly disregarded the *post hoc* rationalizations in the Vipperman affidavit. Such litigation affidavits universally have been rejected as a basis for upholding administrative action. See, *e.g. Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419 (1971); *Rodway* v. *Department of Agriculture*, 514 F.2d 809, 816 (D.C. Cir. 1975). Moreover, "a regulation is not rationally related to the regulatory purpose of a statute just because an agency says so and . . . reasonableness is not a purely legal question. Some factual basis must appear. . . ." *Pan American Petroleum Corp.* v. *FPC*, 352 F.2d 241, 244 (10th Cir. 1965); *accord, National Association of Regulatory Utility Comm'rs* v. *FCC*, 533 F.2d 601, 618 (D.C. Cir. 1976). As the District of Columbia Circuit has recognized, even the comprehensive regulatory powers granted the Federal Power Commission did not give that agency " 'carte *blanche* to take whatever action it might consider appropriate in furtherance of the objectives of the [Natural Gas] Act. The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a 'total transaction' of which another part happens to be

subject to the FPC's control." *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1248 (D.C. Cir. 1973) (footnote omitted).

Amici curiae fully agree with Marathon's position respecting the importance of the question presented (Pet. 6-7). We further urge that the unique statutory framework for judicial review of FEA actions accentuates the need for the Court to exercise its supervisory jurisdiction. The Temporary Emergency Court of Appeals is the only appellate forum for those who challenge such actions. Section 211(b) of Economic Stabilization Act, as incorporated by §5(a)(1) of the Allocation Act, 15 U.S.C. §754(a)(1) (Supp. V 1975). There thus is no other court of appeals available to consider either the nature of the "rule of deference" to which the court below has committed itself (Pet. 16a) or the propriety of following such a rule in construing the Allocation Act, a statute in which Congress has so explicitly limited its grant of authority.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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